REAL MARBLE WORKS SDN BHD

v.

TEH KHOON CHUAN TRADING SDN BHD & ORS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 22-202 OF 1996]
28 MAY 1999

CIVIL PROCEDURE: *Counterclaim - Failure of plaintiff to file defence to counterclaim - Whether defendants entitled to judgment - Rules of the High Court 1980, O. 19 r. 7(1) - Damages awarded to defendants earlier as a consequence of the setting aside of plaintiff's ex parte injunction - Whether defendants estopped from obtaining judgment*

DAMAGES: *Action for - Counterclaim - Failure of plaintiff to file defence to counterclaim - Defendants' claim for judgment sum - Whether liquidated or unliquidated demand - Rules of the High Court 1980, O. 19 r. 2 - Whether defendants' description of claim as special damages irrelevant - Whether court ascertains what is claimed*

WORDS AND PHRASES: *"shall" - Meaning of - Rules of the High Court 1980, O. 19 r. 2 - Whether imperative - Whether gives court discretion to do what is just in the circumstances*

The plaintiff entered into an agreement with the defendants wherein the plaintiff was granted an exclusive license to quarry for limestone on the defendants' lands. In the events that transpired, the plaintiff alleged that the defendants' breached the said agreement, prevented the plaintiff from entering the lands and had themselves been quarrying the same. The plaintiff commenced an action against the defendants for specific performance of the said agreement.

The plaintiff applied and was granted an *ex parte* injunction against the defendants after which all quarry operations on the lands concerned came to a halt. The *ex parte* injunction was later set aside by the court and it was ordered that damages be assessed and paid to the defendants. In the interim period, the defendants filed a defence and counterclaim to the plaintiff's claim in the action. In the counterclaim, the defendants claimed for special damages of RM150,000 for loss suffered due to the *ex parte* injunction. The plaintiff, however, did not file a reply to the said defence or defence to the counterclaim. The Senior Assistant Registrar assessed damages in respect of the said *ex parte* injunction and awarded RM14,655.65 to the defendants.

In this instant, the defendants applied under O. 19 r. 7(1) of the Rules of the High Court 1980 ('RHC') that judgment be entered against the plaintiff for the failure to file a defence to the counterclaim of the defendants.

Held:

[1] Notwithstanding the word "shall" in O. 19 r. 7(1) RHC, the court is only required to give judgment "as the plaintiff appears entitled to on his statement of claim". The word "shall" is not imperative but directory and the above quoted words give the court a discretion to do what in the circumstances is just.

[2] Whether or not the defendants were entitled to enter a final or interlocutory judgment in respect of their claim would depend on whether the RM150,000 represented a liquidated demand or damages, irrespective of the terminology used by the defendants to describe the amount.

[3] By O. 19 r. 2 RHC, where the defendant fails to serve a defence, a plaintiff making a claim for a liquidated demand is only entitled to enter final judgment for a sum not exceeding the amount stated in the claim. By O. 19 r. 3, if a plaintiff's claim is for unliquidated damages, then if default is made in service of a defence, the plaintiff is only entitled to enter interlocutory judgment for damages to be assessed.

[4] The court will direct its mind to the substance rather than the form of the amount claimed so that notwithstanding that a party may choose to quantify his loss and state a definite figure or label his claim as special damages the court will still look at what is claimed to ascertain if they call for further investigation going beyond mere calculation.

[5] The defendants' counterclaim was not founded on contract. Therefore, the RM150,000 did not represent liquidated damages. Eventhough the defendants described the said sum as special damages, no particulars were pleaded of the special damages as required by O. 18 r. 12(1) and (2) RHC. Further, the defendants' claim was not capable of ascertainment by simple arithmetic but require further investigation going beyond mere calculation. As such, despite the description of RM150,000 as special damages, the said claim was really one for general unliquidated damages that must be proved to be recoverable. It followed therefore that the defendants were entitled to enter interlocutory judgment on their counterclaim with damages to be assessed.

[6] However, the defendants in having made a conscious election to proceed with and have their damages assessed before the SAR could not now come before this court to obtain an interlocutory judgment for damages to be

assessed for the very same wrong they already received damages for. The doctrine of estoppel would operate to prevent them from doing so. It did not matter that the plaintiff was not led to believe that the defendants, in having their damages assessed before the SAR, abandoned their claim for damages in their counterclaim as that was a necessary consequence of the defendants electing to have damages assessed before the SAR.

[7] Even if estoppel did not apply, the application would still be dismissed as what the defendants sought in their counterclaim was general damages. Since the defendants dropped their claim to general damages, the interlocutory judgment to be entered for damages to be assessed could not be ordered.

[Application dismissed.]

Case(s) referred to:
Dato' V Kanagalingam v. Tommy Thomas [1997] 3 CLJ 413 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***
Mahinder Singh v. Amanah Saham Pahang Bhd & Anor [1984] 1 CLJ 181 ***(refd)***
MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 2) [1998] 1 CLJ Supp 470 ***(refd)***
Microsoft Corp v. PC House (Imbi) Sdn Bhd [1998] 5 CLJ 474 ***(refd)***
Wallersteiner v. Moir [1974] 3 All ER 217 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 12(1), (2), O. 19 rr. 2, 3, 7(1)

Rules of the Supreme Court [UK], O. 19 r. 7(1)

Others source(s) referred to:
Malaysian High Court Practice, vol 1, pp 486, 532, 537

For the plaintiff - Ram Kumar; M/s Mogan & Co
For the defendants - SY Lee; M/s Mohd Noor & SY Lee

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner JC:

This is an application by the defendants under O. 19 r. 7(1), Rules of the High Court (RHC) for an order that, no defence to the counterclaim of the defendants having been filed and served by the plaintiff, judgment be entered against the plaintiff for:

(i) special damages of RM150,000

(ii) general damages

(iii) costs.

To fully appreciate why this application is being made reference must be made to the background facts.

The 1st, 2nd and 3rd defendants are the registered owners of various parcels of lands in their own right, all at Kampar, District of Kinta, Ipoh. On 18 February 1993, the plaintiff entered into an agreement (hereafter the said agreement) with all three defendants wherein the plaintiff was granted an exclusive licence to quarry for limestone on land belonging to the 1st defendant; granted a right of way over lands belonging to the 2nd defendant to remove the limestone extracted from the 1st defendant's land; and granted permission to build a crusher plant and related works on the 3rd defendant's land so that by the combined use of the defendants' lands the plaintiff could undertake the manufacturing of limestone products. In the events that transpired, the plaintiff alleges that the defendants have breached the said agreement, prevented the plaintiff from entering the lands, and have themselves been quarrying the same.

Accordingly, on 21 November 1996 the plaintiff commenced these proceedings wherein they sought specific performance of the said agreement, an injunction to restrain the 1st, 2nd and 3rd defendants from extracting, storing, selling, and engaging in other activities in connection with limestone products on the lands in question, and the plaintiff also put in a claim for damages.

Having filed their action, the plaintiff applied on *ex parte* basis for, and was on 29 November 1996 granted, an injunction against the defendants. The *ex parte* injunction was duly served on the defendants on 4 December 1996, whereafter all quarry operations on the lands concerned came to a halt. The plaintiff also stationed security guards at the quarry which the defendants say caused them considerable embarrassment. On 31 January 1997, the court set aside the *ex parte* injunction and ordered that damages be assessed and paid to the defendants.

In the meantime, the defendants had filed a defence and counterclaim to the plaintiff's claim. In their defence the defendants deny all the material allegations made in the statement of claim and then by way of counterclaim state:

Counterclaim

22 The defendants repeat paragraphs 1 to 21 of the defence herein.

23 The defendants counterclaim against the plaintiff the sum of Ringgit Malaysia One Hundred and Fifty Thousand (RM150,000.00) being the amount of special damages for losses the 1st defendant has suffered as a

result of the plaintiff obtaining an *ex parte* injunction to restrain the defendants from extracting and removing limestone from the land.

24 In addition, the defendants have suffered damages and loss of reputation and humiliation as a result of the plaintiff posting security guards at the defendants land upon obtaining the *ex parte* injunction.

25 Wherefore the defendants pray that the plaintiff's claim against the defendants be dismissed with cost and that the counterclaim of the defendants be decreed with costs. And the defendants counterclaims for:

(i) The special damages of RM150,000.00;

(ii) General damages;

(iii) Costs.

The above defence and counterclaim was served on 13 January 1997. The plaintiff did not file a reply to the defence or a defence to the counterclaim within the time allowed by the rules.

On 2 June 1997, the defendants applied for the assessment of damages in respect of the *ex parte* injunction that had been set aside. Damages were then ordered to be assessed before the Senior Assistant Registrar (SAR) to be heard on 12 November 1997.

On 23 September 1997 the plaintiff changed solicitors to their present solicitors who on reviewing the cause papers noticed that the plaintiff had not filed a defence to counterclaim. The plaintiff's new solicitors accordingly wrote the defendants' solicitors on the matter, requesting seven days to file a defence of counterclaim. On 5 November 1997 the defendants' solicitors wrote back saying unless a defence to counterclaim was filed within seven days, they would apply for judgment. For reasons that are not apparent, instead of filing a defence to counterclaim within the time permitted, the plaintiff's solicitors on 15 November 1997 filed an application for extension of time to file a defence to counterclaim. This application came up before the Deputy Registrar on 16 February 1998 when it was dismissed. There has been no appeal against that decision.

In the meantime, assessment of damages proceeded on various dates in 1998 before the SAR. Finally on 27 November 1998, the SAR assessed damages at RM14,655.65. Being dissatisfied with the award, both parties have filed an appeal against that decision.

On 16 January 1999, the defendants filed this application for leave to enter judgment in default of defence to counterclaim. This suit proper was called

on for hearing on 25 January 1999 when the court was informed of this application for judgment and in the circumstances I directed that this application be disposed of first.

Before me, Mr S.Y. Lee, learned counsel for the defendants informed the court that the application for judgment is in respect of both special damages of RM150,000 as well as general damages but that the defendants are dropping their claim for general damages. Counsel submitted that as there is no defence to the counterclaim the court is bound to grant judgment for the sum of RM150,000 claimed as special damages in view of the mandatory provisions of O. 19 r. 7(1), RHC (as they apply to a counterclaim) which reads "... the court shall give such judgment as the plaintiff appears entitled to on his statement of claim." The word "shall" makes it mandatory for this court to order judgment for the sum claimed, so submits Counsel and cites in support the case of *Microsoft Corp. v. PC House (Imbi) Sdn. Bhd.* [1998] 6 MLJ 402.

Counsel was adamant that the present application for judgment for special damages is quite distinct and separate from the damages assessed before the SAR and there is no provisions of law that disentitles the defendants to come for judgment on a counterclaim after having assessed damages on an injunction that has been set aside.

On being invited to address the court on whether the sum of RM150,000 stated in the counterclaim was a liquidated demand so as to entitle the defendants to enter final judgment for the amount without more, learned Counsel for the defendants submitted that the defendants are entitled to quantify the amount of their claim and to plead a specific amount in their counterclaim. Learned Counsel cited in support the cases of *Dato' V Kanagalingam v. Tommy Thomas* [1997] 3 CLJ 413 and *MBF Capital Bhd. & Anor v. Tommy Thomas (No. 2)* [1998] 1 CLJ Supp 470; [1997] 3 MLJ 403 in support. Since there is no defence to the counterclaim, the defendants are entitled to judgment for the sum claimed.

Mr. Ram Kumar, learned Counsel for the plaintiff argues that the defendants are not entitled to enter judgment for RM150,000 for the following reasons. Firstly, the counterclaim is clearly brought to recover damages allegedly suffered by the defendants as a result of the plaintiff having obtained the *ex parte* injunction wrongfully. The defendants however, have already had such damages assessed by the SAR during which they claimed for all the loss and damages they suffered and such claims must necessarily have included the sum of RM150,000 which is expressed as special damages in the counterclaim. Since the SAR had already made an award, the defendants are now bound by that award and estopped by record from coming for judgment. The matter is *res judicata*. Secondly, the effect of allowing the defendants to enter judgment

for RM150,000 would mean there are two judgments in this suit thereby allowing the defendants to have two bites of the cherry since they have already proceeded with assessment of damages and obtained an award there. Thirdly, the defendants are seeking two sets of damages for the same wrong. There is already an award on assessment of damages and now the defendants seek judgment in default in the sum of RM150,000 for the same wrong. Fourthly, the defendants' claim of RM150,000 although stated as special damages, is really a claim for general damages and as such must still be proved.

Having heard submissions, I find that the issues for determination in this application may be stated thus:

(1) in a situation where as here, a defendant serves a counterclaim for loss and damages allegedly suffered as a result of an injunction, and in so doing qualifies his alleged loss and damages and describes it as special damages, will that defendant be entitled as of right to obtain judgment for the amount stated in his counterclaim if there is default in serving a defence to the counterclaim; and

(ii) if the offending injunction is set aside and the counterclaiming defendant has taken steps to assess his damages and has obtained an award therefore, is he precluded from obtaining judgment on his counterclaim in respect of the damages allegedly suffered as a result of that injunction.

As regards the first issue, simply stated, it is learned counsel for the defendant's position that once there is no defence filed to the counterclaim, the court has no discretion in the matter but must grant judgment. If the claim is for a quantified amount, then judgment for that sum must be entered in view of the mandatory word "shall" in O. 19 r. 7(1) RHC.

To begin with, I am unable to agree with counsel's submission that O. 19 r. 7(1) is a mandatory provision. To me, notwithstanding the word "shall" in the rule, a proper reading of it shows that the court is only required to give judgment "as the plaintiff appears entitled to on his statement of claim." Despite peremptory word "shall" the authorities show that the word is not imperative but directory and that the above quoted words give the court a discretion to do what in the circumstances is just. Counsel for the defendants has cited the case of *Microsoft Corp v. P.C. House (Imbi) Sdn. Bhd. (supra)* in support of his application for judgment, but a proper reading of that case shows that the court instead of being under any compulsion to grant judgment instead has a discretion in dealing with an application for judgment under O. 19 r. 7(1) RHC and may, for example, exercise discretion to extend time to file a defence instead of granting judgment.

In the *Microsoft Corp* case, the learned judge in saying that the court had a discretion referred to the commentary on O. 19 r. 7(1) RHC in *Malaysian High Court Practice* Vol. 1 at p. 537 and the decision of in *Wallersteiner v. Moir* [1974] 3 All ER 217, a reading of which case shows that Lord Denning J, at p. 232 in fact explains that the word "shall" found in the then English O. 19 r. 7(1) RSC, which is the equivalent of our O. 19 r. 7(1) RHC, is not imperative but directory.

In *Wallersteiner's* case, counsel there had raised, like here, the argument that the language of the English O. 19 r. 7(1) RSC employing the word "shall" is mandatory. To that submission, this is what Buckley L.J. said on p. 245:

> I am however, of the clear opinion that the language of that rule does not deprive the court of the discretionary power to extend a party's time to plead. See in this connection *Charles v. Shepherd*. The language of the rule then in force differed from the language of the present rule but not, I think, in substance. The decision in that case was that the court had power under the then rule to grant an interlocutory judgement, but Lord Esher MR said:
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> > We have consulted the members of the other divisions of the Court of Appeal upon the question of the construction to be place upon Order XXVII., r. l1 and we are of the opinion, upon the true construction of that rule-first, that the Court is not bound to give judgement for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgement; it has a discretion to refuse to make the order asked for, and secondly, that the expression, "such judgement as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to," includes an interlocutory judgement, to be subsequently worked out, as well as a final judgement.
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> In the earlier case of *Gibbings v. Strong* the Earl of Selborne LC, discussing the same language said:
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> > This means that the Court is to exercise some judgement in the case: it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegation in his statement of claim, he appears to be entitled; and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains.
>
> In my judgement the language of RSC Ord. 19, r.7 is not mandatory in its effect and leaves the Court with a discretion to do what in the circumstances of the case is just.

Directing attention now to the counterclaim filed, it was the submission of learned counsel for the defendants that because the defendants have quantified their special damages at RM150,000, they are entitled to judgment for that sum. I regret I am unable to agree with that submission. Whether or not the

defendants will be entitled to enter a final or interlocutory judgment in respect of their claim will depend on whether the RM150,000 represents a liquidated demand or damages, irrespective of the terminology used by the defendants to describe the amount.

The Rules of the High Court draw a clear distinction between a claim for a liquidated demand and a claim for unliquidated damages. Thus, by O. 19 r. 2, a plaintiff making a claim for a liquidated demand only is entitled, on failure of a defendant to serve a defence, to enter final judgment for a sum not exceeding the amount stated in the claim. By O. 19 r. 3, if a plaintiff's claim is for unliquidated damages only, then if default is made in service of a defence, the plaintiff is entitled to enter interlocutory judgment for damages to be assessed.

Useful reference may be had to the commentary found at p. 532, *Malaysian High Court Practice*, vol. 1 for the important distinction between a liquidated demand and damages and on the expression 'damages' which reads:

> [19.2.1] Liquidated demands
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> A liquidated demand is in the nature of a debt where a specific sum of money which is already ascertained or capable of ascertainment by simple arithmetic is due and payment made under or by virtue of a contract. The expression is to be distinguished from 'damages', which means a sum of money which, although specified as a definite figure, requires further investigation going beyond mere calculation: See *Seok Mee Seong v. Abdul Nahab bin Abdul Rahman* [1989] 1 MLJ 193; *Knight v. Abbott* [1883] 10 QBD 111.

Equally helpful in considering the matter at hand is the case of *Mahinder Singh v. Amanah Saham Pahang Bhd. & Anor* [1984] 1 CLJ 181. In that case, as a result of a motor vehicle accident in which damage was sustained to his car, the plaintiff sued the defendant and in his statement of claim inserted a sum of RM28,814.04 as special damages. When the defendant did not enter appearance, the plaintiff sealed judgment in default for the amount stated in the writ. On application by the defendants, the judgment in default was set aside and in so doing, this is what VC George J, (as he then was) said at p. 182 in relation to the sum of RM28,814.04 claimed as special damages:

> To my mind many of the items that made up the RM28,814.04 call for investigation beyond mere calculation and accordingly are not debts or liquidated demands but damages.

and later on the same page

> In short to my mind most of the items claimed as Special Damages are what they are alleged to be in paragraph 5 of the statement of claim *ie*, losses and damages that have to be proved.

What is apparent from a reading of the passages I have referred to above is that the court will direct its mind to the substance rather than the form of the amount claimed so that notwithstanding that a party may choose to quantify his loss and state a definite figure or label his claim as special damages the court will still look at what is claimed to ascertain if they call for further investigation going beyond mere calculation.

Acting in accordance with the directory provisions of O. 19 r. 7(1) RHC, I have looked at the counterclaim filed and from a perusal thereof the following become evident. Firstly, the defendants' counterclaim is not founded on contract; the RM150,000 does not therefore represent liquidated damages. Secondly, even though the defendants have described the sum as special damages, no particulars have been pleaded of the special damages as required by O. 18 r. 12(1) and (2) RHC, (see the commentary in *Malaysian High Court Practice*, vol. 1 p. 486 at special damages). To me, this suggests that the figure of RM150,000 has simply been inserted in the counterclaim as special damages without any factual basis for the same and draw attention to the fact that when the defendants served their counterclaim on 13 January 1997, the injunction had not yet been set aside and as such the losses and damages allegedly suffered by the defendants would not have crystallised nor be capable of calculation with complete accuracy so as to be stated as a precise amount and pleaded as special damages. In so far as the defendants rely on the cases of *Dato V Kanagalingam (supra)* and *MBF Capital Bhd. (supra)* in support of their contention that they are not prohibited from quantifying the amount of their claim, I must respectfully say that I have not found these cases to advance the case of the defendants nor of assistance to the court in deciding the issue at hand because in both those cases, the claim of the plaintiff was for general and not special damages and the issue in those cases was not, as here, whether having quantified their claim, the plaintiff was entitled without more to enter judgment for them in the event of a default of defence. Thirdly, para. 23 and 24 thereof clearly shows that the whole of the defendants' counterclaim is to recover compensation under two heads of damages, namely, for economic loss suffered as a result of having to stop quarry operations and for humiliation suffered as a result of a security guard being placed at the quarry. To my mind, the very nature of these claims show that they are not matters capable of ascertainment by simple arithmetic but require further investigation going beyond mere calculation and as such despite the description of the RM150,000 as special damages, the defendants claim is really one for general unliquidated damages that must be proved to be recoverable.

It follows from what I have said above that in accordance with the provisions of O. 19 r. 7(1) RHC, what the defendants are entitled to is to enter

interlocutory judgment on their counterclaim with damages to be assessed. The matter does not end there however, because I now need to consider the second issue.

The whole of the defendants' counterclaim and relief sought therein is in respect of loss and damage allegedly suffered by the defendants as a result of the *ex parte* injunction obtained by the plaintiff. The counterclaim was filed on 13 January 1997, at which time the defendants had no way of knowing whether the injunction would be set aside or continued. However, when the injunction was set aside on 31 January 1998, and an order made for damages to be assessed, the defendants would have been conscious of the fact that they had by their counterclaim sought for damages in respect of the very same injunction that had been set aside. With that knowledge, the defendants then applied for damages to be assessed and proceeded with it to conclusion when they were awarded RM14,655.66 by the SAR. They are obviously unhappy at the award and have appealed. So have the plaintiff. Having proceeded to prove their loss and damages before the SAR and having obtained an award there, the defendants now say that their application to assess damages and this application for judgment on their counterclaim are two separate matters. In an affidavit affirmed on 23 February 1999 in support of the defendants' application, Teh Hor Yick, the 2nd defendant states in para. 10 thereof that the counterclaim is similar but not identical to the assessment of damages. Fortunately, there is on file the written award of the SAR entitled grounds of judgment in respect of the damages awarded to the defendants.

The award lists out conveniently the items in respect of which the defendants claimed losses and damages for. They are:

(1) Loss and damages for embarrassment caused by the stationing of security guards.

(2) The difference in credit sales and sales in the month of December 1996 when compared with the turnover of sales in November 1996 and January 1997 (for which a claim of between RM154,584.32 and RM196,392.38 was made).

(3) Damages for wages paid to employees during the period of injunction between 4 to 13 December 1996.

(4) Damages for loss of Road Tax and Insurance of transport vehicles during material period.

(5) Damages for loss of goodwill as a result of injunction on the quarry operation.

I make no comment on the decision of the SAR and only refer to it to show what loss and damages the defendants had sought to prove before him. I agree with counsel for the plaintiff that what was claimed before the SAR as loss and damages would cover the same loss and damages referred to in para. 23 and 24 of the counterclaim. In my judgment, the situation that presented itself to the defendants on 31 January 1997 when the *ex parte* injunction was set aside was this: they could proceed to act on the order for damages to be assessed and paid to them or alternatively, they could have applied to enter interlocutory judgment in default of defence to their counterclaim and for damages to be assessed in respect thereof. The above alternative courses open to the defendants were mutually exclusive to each other because the law prohibits a litigant from being awarded damages twice for the same wrong. The defendants in having made a conscious election to proceed with and have their damages assessed before the SAR cannot now come before this court to obtain an interlocutory judgment for damages to be assessed for the very same wrong they have already received damages for. The doctrine of estoppel as applied to the conduct of litigation will operate to prevent them from so doing.

That doctrine is explained in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 2 MLJ 565 by Gopal Sri Ram JCA in these terms (at p. 583):

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed, this is true of all cases where the doctrine has been applied to other spheres of human activity.

And later in the same judgment, his Lordship goes on to state the global question a court must ask in applying the doctrine, thus:

> Accordingly, the global question which a court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.

Asking myself that question in the light of the facts and circumstances I have already discussed earlier in this judgment, it is my finding that it is not just and equitable that the defendants should succeed in this application and that estoppel will operate to prevent them from being so. In the operation of the doctrine to the particular facts of this case, it is my view that it would not have mattered that the plaintiff had not been led to believe that the defendants,

in having their damages assessed before the SAR, had abandoned their claim for damages in their counterclaim because that is a result that would follow as a necessary consequence of the defendants electing to have damages assessed before the SAR.

I accordingly dismiss the defendants' application with costs. For completeness, I would say that even if estoppel did not apply, I would have still dismissed the application because what the defendants had sought in their counterclaim was general damages. However, as the defendants had informed the court through their counsel that they were dropping their claim to general damages, I would not have ordered interlocutory judgment to be entered for damages to be assessed.